

the additional financial information the State requested. The State is entitled to production of the requested information.

II. Factual Background

In its July 10, 2006 requests for production, the State requested information regarding the Cargill Defendants' net worth, and they objected to this request, claiming the information was irrelevant and confidential.

Request for Production #107: Please produce all documents and materials reflecting, referring to or relating to your net worth.

Response: Cargill, Inc. objects to this request to the extent that it seeks confidential and proprietary trade secret or business documents without entry of an appropriate confidentiality and protective order. Cargill, Inc. further objects to this request as overbroad, burdensome and not reasonably calculated to lead to the discovery of admissible evidence to the extent that it: seeks document prior to 2002; seeks information protected by the attorney client or work product privileges; and seeks all documents "reflecting, referring to or relating to" the subject matter of this request. Subject to and without waiving these objections, Cargill, Inc. will produce upon entry of a mutually agreeable confidentiality and protective order documents summarizing Cargill, Inc.'s net worth during the applicable time period. Cargill, Inc. will supplement this response to include other documents "reflecting, referring to or relating to" its net worth if Plaintiff will narrow this request by providing further specificity as to the particular information about which it inquires and the type of documents sought.

Ex. A & B (Cargill Inc. and Cargill Turkey Production Responses, each articulating the same objections).

The State served another request for production regarding the Cargill Defendants' financial condition in its September 13, 2007 Requests for Production, and despite the fact the confidentiality order was in place at the time, the Cargill Defendants again objected and failed to produce any responsive information.

Request for Production #11: To the extent you have not already produced them, please produce copies of documents reflecting your financial statements for fiscal years 2002 to the present, as well as any other documents reflecting your net worth for fiscal years 2002 to the present. For purposes of this request for

production, the term “financial statement” includes, but is not necessarily limited to, balance sheets, statements of income, statements of equity position, statements of cash flow, and all footnotes.

Response: Cargill Incorporated objects to this request as duplicative of Document Request No. 107 in Plaintiffs’ July 10, 2006 Set of Document Requests. Cargill Incorporated incorporates herein by reference its objections and responses to Document Request No. 107 in Plaintiffs’ First Set of Document Requests as if fully set forth herein.

Ex. C & D (Cargill Inc. and Cargill Turkey Production Responses, each articulating the same objections).

In its continued effort to obtain responsive documents, in a letter dated October 24, 2008, the State provided the Cargill Defendants with a list of seven specific types of financial documents it was seeking in regard to these two discovery requests. *See* Ex. E. On November 17, 2008, counsel for Cargill and the State met and conferred regarding these discovery requests. Counsel for the State again articulated the information sought in the discovery requests. Counsel for Cargill agreed to produce financial information that would provide a complete understanding of the Cargill Inc.’s financial condition, and to speak with his client regarding the production of Cargill Turkey Production’s financial information. The parties agreed the State would review the information produced, then advise counsel for the Cargill Defendants if additional information was needed. On December 4, 2008, a week after the date the parties agreed upon for production of the information, the Cargill Defendants finally produced extremely limited financial information for Cargill Inc., but did not produce any information for Cargill Turkey Production. The information produced for Cargill Inc. was a “one page typed summary of eight line items obtained from five years of annual audited financial statements which was already

available from Cargill's home website address." See Ex. F [Payne Report], p. 3-4.² On December 10, 2008 counsel for the State wrote the Cargill Defendants' counsel regarding the insufficiency of the production. Specifically, the State again requested complete financial statements which would include income information, cash flow information, and the notes that are an integral part of the balance sheets. See Ex. G (Xidis 12/10/08 email to Walker). Finally, on December 23, 2008 counsel for Cargill produced the first financial information for Cargill Turkey Production. However, this production was merely another one page summary with very limited financial information. See Ex. H.³ To date, the Cargill Defendants still have not responded to the State's request for complete financial statements.

III. Argument

The discovery regarding the Cargill Defendants' net worth and corresponding financial documents is relevant to the State's claim for punitive damages, and the Cargill Defendants' objections are without merit. In its written responses to this discovery, the Cargill Defendants objected to the State's discovery regarding its financial condition on the baseless claim that the requests were overbroad, burdensome and not reasonably calculated to lead to the discovery of admissible evidence. This assertion is baseless. One of the seven factors for a jury to consider in evaluating punitive damages under Oklahoma law is "[t]he financial condition of the defendant." 23 Okla. Stat. Ann. § 9.1. This Court has repeatedly held that discovery regarding a defendant's financial condition and net worth is appropriate when a claim for punitive damages has been made. See, e.g., *Hightower v. Heritage Academy of Tulsa, Inc.*, 2008 WL 2937227 (N.D. Okla.

² Because of the confidential nature of the information contained in the report, a copy of this exhibit will be provided to the court under separate cover for an *in camera* review pursuant to Paragraph 6 of the Confidentiality Order (DKT# 985).

³ Because of the confidential nature of the information contained in this document, a copy of this exhibit will be provided to the Court under separate cover for an *in camera* review pursuant to Paragraph 6 of the Confidentiality Order (DKT# 985).

July 29, 2008) (“Financial records are discoverable when punitive damages are at issue”); *American Benefit Life Ins. Co. v. Ille*, 87 F.R.D. 540, 542 (N.D. Okla. 1978) (“It is well settled in Oklahoma that in an action wherein punitive damages are proper, evidence of the financial worth of the defendant is competent and admissible.”). In the *City of Tulsa* case, this Court held that “[i]t would appear that *financial statements* reflecting the Defendants’ net worth from 1996 forward would be sufficient for the Plaintiffs’ needs. . . . This order is without prejudice to Plaintiffs’ re-urging the motion *should additional financial information be necessary* as the case progresses.” See Ex. I, p. 6 (emphasis added). The full financial statements that the State has repeatedly requested, including information on income and cash flow, and the notes that are “integral” to the financial statements, are obviously relevant evidence regarding the Cargill Defendants’ financial condition, a key element in the punitive damages analysis. Moreover, recent tax returns are also relevant to this analysis in that they are the data used and relied upon to prepare the financial statements and contain additional information that demonstrate how certain debt obligations are treated among related entities. See Ex. J ¶¶ 10-11.

The State’s expert who will testify about the financial conditions of the defendants, David Payne, drafted reports providing as much analysis as possible with the limited information produced thus far by the Cargill Defendants, and that report was timely disclosed to them on January 5, 2009. However, as explained in his report on the Cargill Defendants, and his attached affidavit, the information requested by the State is important and relevant information for a fuller analysis. See Ex. F and J. As Mr. Payne explains in his affidavit, “GAAP [financial] Statements, Footnote Disclosures, and Consolidating Data are relevant to evaluating the financial condition, net worth and/or Ability to Pay of the Defendants.” See Ex. J, ¶ 10. Although the brief summaries produced by the Cargill Defendants contain some very limited information

about net worth, they do not include important information about the Cargill Defendants' income or cash flow. The income and cash flow of a defendant are important elements to understanding the true nature of a company's financial condition. As Mr. Payne explains in his affidavit, "[t]he starting point for assessing the Financial Attributes affecting financial condition involves an evaluation of data as reported by the Defendants in their books, records, and financial statements ("Book Values"). Ability to Pay also considers true economic or intrinsic value ("Economic Value"), normalized earnings, and discretionary cash flows ("Earning Capacity") under the control of the managements for the Defendants." *See* Ex. J, ¶ 4. With only a balance sheet, a company's net worth is stated, but net worth alone is not necessarily a full picture of a company's financial condition. The level of a company's income is an important element of whether there is real or intrinsic value above the book value stated in a balance sheet. Moreover, complete tax returns also provide information relevant to evaluating financial condition by showing how a company treats debt obligations and distributes income. *See, e.g.,* Ex. J, ¶¶ 10-11.

While several years ago one might have argued that production of anything more than a current balance sheet is not relevant to the evaluation of a company's financial condition, the playing field has been altered by today's economy. A balance sheet is nothing more than a snapshot in time of a company's net worth on a given day. In today's volatile economy, the net worth of a company can fluctuate considerably in a very short period of time. Therefore, a more in-depth analysis is needed to determine a full picture of financial condition of any given company. The State cannot imagine that the Cargill Defendants or any other defendant in this matter would want anything but the most thorough and up-to-date analysis of their financial conditions presented to the jury.

The Cargill Defendants' objections regarding the burden of producing complete financial statements are likewise without merit. Complete financial statements should be readily available for Cargill. As Mr. Payne explains, "[b]ased upon my training and experience with privately held companies [like Cargill Inc.] GAAP Statements and Footnote Disclosures are generally prepared and are available in the ordinary course of business due to Stakeholder Requirements." *See* Ex. J, ¶ 8.

For Cargill Turkey Products, during the meet and confer conversations between counsel, the State specifically requested the consolidating format financial information, which Cargill Inc. would have readily available in order to perform its accounting as the parent company. As David Payne explains in his affidavit, "[a]t a minimum, the data incorporated for a Tier 2 company [like Cargill Turkey Products] into a Tier 1 Defendants' GAAP Statements and Footnote Disclosures has to exist in order for such audit reports to be issued (on an unqualified basis). Such data is commonly referred to as "consolidating financial statement" data." Ex. J, ¶ 4. However, rather than producing this readily available and relevant information for Cargill Turkey Products, counsel produced another minimal summary which provides very little substantive information.

The Cargill Defendants' objections regarding confidentiality of the requested materials are without merit. This argument ignores the November 2006 confidentiality order the Court entered in this case that provides protection for sensitive business information. *See* DKT # 985. The confidentiality order provided methods for protecting confidential business information. Specifically, the order provides for a "Confidential" designation that protects designated documents from disclosure to third parties except for preparation of the case, and a "Confidential: Attorneys' Eyes Only" designation that protects designated information from

disclosure to third parties as well as a further level of protection for Defendants from each other, since they are competitors in the same industry. *See* DKT# 985, pp. 2-6. The confidentiality order provides more than adequate protection for the relevant information the State is requesting about the Cargill Defendants' financial condition. The Cargill Defendants are clearly aware of this protection as they marked the few documents they did produce with confidentiality designations (although the information for Cargill Inc. which is publically available on Cargill's website clearly should not have been marked as such).

With the Cargill Defendants having no valid objections to the requested discovery, the State requests that the Court order them to provide the following documents that are responsive to the State's requests for production: Complete financial statements for Cargill Inc., including information about income and cash flow for calendar years ending in 2003-2008, all corresponding notes for these financial statements, consolidating financial statements for Cargill Turkey Production, and complete filed tax returns for 2006 and 2007 (including all supporting schedules, disclosures, and detailed appreciation schedules).

IV. Conclusion

For the reasons stated herein, the Court should order the Cargill Defendants to respond to the State's requests for information pertaining to its financial condition and to provide the specific documents delineated herein. Because this information is readily available to the Cargill Defendants and these requests have been outstanding for a very long time, the State requests that Cargill be requested to produce these materials immediately. The State's expert, David Payne, will need to review these documents upon receipt of them from the Cargill Defendants. The State anticipates it will be requesting leave to supplement Mr. Payne's expert report once he has had an opportunity to review this information.

Respectfully Submitted,

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